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FIRST GENERAL COUNSEL'S REPORT

7 MUR: 6242

8 DATE COMPLAINT FILED: December 17, 2009

9 DATE OF NOTIFICATION: February 25, 2010

10 DATE LAST RESPONSE RECEIVED: April 6, 2010

11 DATE ACTIVATED: April 2, 2010

12
13 SOL: April 24, 2014

14
15 COMPLAINANT:

Grant Woods

16
17 RESPONDENTS:

J.D. Hayworth 2010 and Kelly Lawler, in her official
capacity as Treasurer

18
19
20 Clear Channel Communications, Inc.

21
22 RELEVANT STATUTES:

2 U.S.C. § 441b(a)

23 11 C.F.R. § 100.72

24 11 C.F.R. § 100.73

25 11 C.F.R. § 100.131

26 11 C.F.R. § 100.132

27 11 C.F.R. § 109.21

28 11 C.F.R. § 114.2(b)

29
30 INTERNAL REPORTS CHECKED: None

31
32 FEDERAL AGENCIES CHECKED: None

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35 I. INTRODUCTION

36 This matter involves allegations that Clear Channel Communications, Inc. ("Clear
37 Channel"), and J.D. Hayworth 2010 and Kelly Lawler, in her official capacity as Treasurer (the
38 "Committee"), violated the Federal Election Campaign Act of 1971, as amended (the "Act"), and
39 its accompanying regulations in connection with The J.D. Hayworth Show (the "Show"),
40 broadcast on AM radio station KFYI, serving Phoenix, Arizona ("KFYT").

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As discussed below, because the press exemption set forth in 11 C.F.R. § 100.73 applies to the broadcast, we recommend that the Commission find no reason to believe Clear Channel Communications, Inc., made, or J.D. Hayworth 2010 and Kelly Lawler, in her official capacity as Treasurer, accepted, corporate in-kind contributions, and close the file.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

Clear Channel Communications, Inc., is a media and entertainment corporation specializing in radio programming and outdoor advertising. Clear Channel owns KFYI, which broadcasts nationally syndicated talk shows, such as The Rush Limbaugh Show and The Sean Hannity Show, in addition to local programming. Clear Channel Resp., 1. Until recently, KFYI's local programming included The J.D. Hayworth Show.

J.D. Hayworth is a former U.S. Congressman (1994-2006), as well as a current candidate for Republican nominee to the U.S. Senate from Arizona in the 2010 election. J.D. Hayworth 2010 is Hayworth's principal campaign committee. Hayworth has had a career as a professional television and radio broadcaster that began approximately thirty years ago. Committee Resp., 3. Even while serving in Congress, Hayworth worked as a fill-in host for at least two nationally syndicated radio shows. *Id.* Furthermore, during his tenure on the Show, he made frequent guest appearances on national cable television outlets, such as Fox News Channel, Fox Business Network, and CNBC. *Id.* at 2-3.

Hayworth began hosting the Show on April 26, 2007, shortly after the 2006 Congressional elections. See Committee Resp., 2. The Show ran from 4:00 PM to 7:00 PM on weekdays for nearly three years, and content consisted of "newstalk"—whatever happens in the headlines, prompting commentary from [Hayworth's] unique perspective." See Clear Channel

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1 Resp., 2 (*quoting* <http://www.jdhayworth.com>¹). Topics ranged “from immigration reform to
2 pro-growth economics to the ins-and-outs of political campaigns.” *Id.*

3 On January 22, 2010, the Show aired its final broadcast amid speculation that Hayworth
4 intended to challenge Senator John McCain for the Republican nomination in the party's August
5 2010 Senate primary. Hayworth officially announced his candidacy for the Senate on February
6 15, 2010. *See Arizona Daily Star, Hayworth Enters U.S. Senate Race*,
7 http://azstarnet.com/article_01f227ad-c734-5e2e-9197-80bbefddc2d4.html (last visited on
8 February 16, 2010).

9 Complainant alleges that Clear Channel made, and the Committee accepted, prohibited
10 corporate in-kind contributions in violation of the Act. Specifically, the Complaint alleges that
11 Hayworth began “testing the waters” of a Senate candidacy as early as April 24, 2009, *see*
12 Compl., 2, and that Hayworth’s commentaries on the Show regarding his eventual opponent
13 constituted “coordinated communications” that resulted in Clear Channel making prohibited
14 contributions to the Committee in amounts of as much as \$540,000 per week. *See* Compl., 3-4.
15 Complainant further alleges, without elaboration as to the basis, that these violations were
16 knowing and willful. *Id.*

17 Complainant filed a Supplement to the Complaint on January 6, 2010, containing
18 unofficial transcripts of portions of seven broadcasts of the Show, each allegedly indicating
19 Hayworth’s interest in running for Senate and/or his desire to see McCain defeated in the 2010
20 primary. *See generally* Compl.; Supplement to Compl. Several statements contained in the
21 transcripts pertain to a series of public opinion polls—two commissioned by Rasmussen Reports
22 and one hosted online at KFYI’s website—that pitted Hayworth against McCain in a potential

¹ This website now redirects to <http://www.jdforsenate.com/>, but as of February 3, 2010, it contained the quoted material.

primary matchup. *See, e.g.,* Compl., 3, n. 11; Supplement to Compl., 10-11, 13, 15-16, 20-24, 26-27, 31-34, 36-37, 39, 41, 43-46, 48.

Clear Channel filed a response to the Complaint and Supplement to Complaint on February 3, 2010, contending that the Complaint fails to allege a violation of the Act or its accompanying regulations for three reasons: (1) the costs incurred in broadcasting the Show qualify for the press exemption; (2) "coordination restrictions only apply to candidates, and Mr. Hayworth was not a candidate while he was hosting" the Show; and (3) the costs incurred by Clear Channel in producing and broadcasting the Show "were not subject to the restrictions of the testing the waters exception." Clear Channel Resp., 8.

The Committee filed a response to the Complaint and Supplement to Complaint on April 6, 2010, arguing that the Respondents did not violate the Act because: (1) the press exemption applies to the alleged violations in this case; and (2) even if the press exemption did not apply, Hayworth was not a candidate at the time the alleged violations occurred. *See* Committee Resp., 1.

B. Legal Analysis

The Act prohibits corporations from making contributions from their general treasury funds in connection with the election of any candidate for Federal office. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b)(1). The Act and Commission regulations define the term "contribution" to include any gift of money or "anything of value" for the purpose of influencing a Federal election. *See* 2 U.S.C. § 431(8)(A); 11 C.F.R. § 100.52(a). The term "anything of value" includes all in-kind contributions, 11 C.F.R. § 100.52(d)(1), such as communications that are coordinated with a candidate. 11 C.F.R. § 109.21. Exempt from the definition of contribution, however, are "any cost[s] incurred in covering or carrying a news story, commentary, or editorial

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1 by any broadcasting station (including a cable television operator, programmer or producer),
2 Web site, newspaper, magazine, or other periodical publication . . . unless the facility is owned or
3 controlled by any political party, political committee, or candidate[.]” 11 C.F.R. § 100.73. This
4 exclusion is known as the “press exemption.”

5 The Commission conducts a two-step analysis to determine whether the press exemption
6 applies. First, the Commission asks whether the entity engaging in the activity is a press entity
7 as described by the Act and regulations. See Advisory Opinion 2005-16 (Fired Up!). Second, in
8 determining the scope of the exemption, the Commission considers: (1) whether the press entity
9 is owned or controlled by a political party, political committee, or candidate; and, if not, (2)
10 whether the press entity is acting as a press entity in conducting the activity at issue (i.e., whether
11 the entity is acting in its “legitimate press function”). See *Reader's Digest Association v. FEC*,
12 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981). If the press entity is not owned or controlled by any
13 political party, political committee, or candidate, and if it is acting as a press entity with respect
14 to the conduct in question, the Commission lacks subject matter jurisdiction over the complaint.
15 *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308, 1313 (D.D.C. 1981).

16 Complainant acknowledges that Clear Channel, a global media and entertainment
17 corporation specializing in radio programming and outdoor advertising, is a press entity as
18 described by the Act and Commission regulations. Complainant alleges, however, that because
19 Hayworth, as a putative candidate, “control[led] all content and messages aired on KFYI during
20 his regular show on weekdays from 4pm to 7pm,” the broadcasts fail the “owned or controlled”
21 requirement of the press exemption. Compl., 2. Commission decisions on past MURs involving
22 radio talk show hosts who later become candidates have never found that a host/candidate
23 “owned or controlled” the entity for purposes of the press exemption on the basis that the

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1 host/candidate had a role in determining program content. *See, e.g.*, MUR 5555 (Ross); MUR
2 4689 (Dornan).²

3 Two considerations in determining whether an entity is acting in its legitimate press
4 function include whether the entity's materials are available to the general public and whether
5 they are comparable in form to those ordinarily issued by the entity. Advisory Opinion 2005-16
6 (Fired Up!) (citing *FEC v. Massachusetts Citizens for Life ("MCFL")*, 479 U.S. 238, 251
7 (1986)). Here, we first note that the broadcasts were available to the general public. Second, the
8 broadcasts as transcribed in the Complaint and Supplement to Complaint appear to be
9 comparable in form to those broadcasts of the Show ordinarily issued by the entity, which
10 broadcasts maintained a "newstalk" format consisting of "news, commentary and editorial"
11 material on a variety of topics. *See* MUR 5555 (Ross) (radio talk show host who became a
12 candidate was eligible for the press exemption where program format did not change after he
13 began to consider candidacy); MUR 4689 (Dornan) (radio guest-host who later became a
14 candidate was eligible for the press exemption for commentary critical of eventual opponent
15 where there was "no indication that the formats, distribution, or other aspects of production"
16 were any different when the candidate hosted than they were when the regular host was present).
17 In sum, Clear Channel was acting within its legitimate press function in broadcasting the Show,
18 and the Respondents are therefore subject to the press exemption. Accordingly, we recommend
19 that the Commission find no reason to believe Clear Channel Communications, Inc., or J.D.
20 Hayworth 2010 and Kelly Lawler, in her official capacity as Treasurer, violated 2 U.S.C. § 441b.

² Though the Commission has never adopted the Complainant's position, the dissenting Statement of Reasons in MUR 4689 (Dornan) by Commissioners McDonald and Thomas argues that where a Federal candidate makes all editorial decisions regarding, and exercises complete control over the content of, a radio or television broadcast, "it is no longer a news media broadcast, but rather a candidate broadcast and outside the media exemption." MUR 4689, Statement of Reasons of Commissioners McDonald and Thomas, 10.

Because the press exemption applies to the alleged contributions in the present case, it is unnecessary to consider whether some of the activities might qualify for the testing the waters exemption or constitute coordinated communications. Further, because there is no violation of the Act, the allegation that the Respondents acted knowingly and willfully is moot.

III. RECOMMENDATIONS

1. Find no reason to believe Clear Channel Communications, Inc., violated 2 U.S.C. § 441b;
2. Find no reason to believe J.D. Hayworth 2010 and Kelly Lawler, in her official capacity as Treasurer, violated 2 U.S.C. § 441b;
3. Approve the attached Factual and Legal Analysis;
4. Approve the appropriate letters;
5. Close the file.

Thomasenia P. Duncan
General Counsel

Date:

5/29/10

By:


Ann Marie Ferziken
Associate General Counsel


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